RESPONSIVENESS SUMMARY
FOR SECTION 550 OF THE MODEL TOXICS CONTROL ACT
CLEANUP REGULATION, CHAPTER 173-340 WAC

ADMINISTRATIVE ORDER #91-61

October 19, 1993

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AMENDMENTS TO WAC 173-340-550
RESPONSIVENESS SUMMARY

INTRODUCTION

This responsiveness summary addresses written and oral comments on the proposed amendments to section 550 of the Model Toxics Control Act Cleanup Regulation (Chapter 173-340 WAC) received by the Washington State Department of Ecology (Ecology or Department) during the public comment period for the rule amendment, August 4, 1993, through September 3, 1993. Copies of the public comment letters can be found in Appendix One.

Reasons For The Rule:

The rule amendment is necessary to clarify several cost recovery provisions provided under the Model Toxics Control Act (MTCA), Ch. 70.105D RCW, and to provide guidance on the definition of certain terms in legislation addressing private rights of action.

Statutory Authority For The Rule:

The MTCA, Chapter 70.105D RCW, was passed by the voters of the State of Washington in November 1988. Effective March 1, 1989, the law establishes the basic authorities and requirements for cleaning up contaminated sites in a manner that protects the state's citizens and the environment. The Act makes liable persons liable for all remedial action costs and empowers the attorney general, at the request of the Department, to recover those costs.

Chapter 173-340 of the Washington Administrative Code (WAC) implements the MTCA. It provides for recovery of costs expended by Ecology and defines costs as those which are reasonably attributable to the site, including costs of direct activities, support costs of direct activities, and interest charges for delayed payments.

The basic statutory authority for this amendment is derived from RCW 70.105D.030(1)(f) and 70.105D.040(2). In addition, Substitute Senate Bill 5404 gives Ecology the authority to adopt rules providing Ecology's interpretation of those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action.

SUMMARY OF PROPOSED RULE

The proposed rule amendment addresses several provisions of WAC 173-340-550.

1. The rule amendment will clarify the types of agency costs that will be included in the definitions of the costs the Department may recover from potentially liable persons. The terms the rule will clarify are: "costs of direct activities," and "support costs of direct activities." Specifically, the rule allows the Department to charge for all hours worked on a site and includes leave and holiday time as a benefit. Program support will be included in the definition of support costs of direct activities.

   This amendment will allow the Department to cost recovery amounts closer to the true costs of providing oversight at contaminated facilities.

2. The legislature has amended the MTCA to expressly provide a "right of contribution," or "private rights of action." This amendment will allow potentially liable persons to bring private actions to recover from other potentially liable persons (PLPs), a portion of the remedial action costs incurred during cleanup. Ecology has provided by regulation Ecology's interpretation of what constitutes a "substantial equivalent of a department-conducted or department-supervised remedial action."

   The purpose of this subsection is to facilitate private rights of action and minimize Department staff involvement in these actions by providing guidance to PLPs and the court on what remedial actions the Department would consider as substantially equivalent.

   This amendment will encourage independent cleanups. It provides guidance to individuals who wish to cleanup sites on their own about what actions they should take in order to have a right to recover a portion of their costs from other PLPs.

3. To meet public demands, the Toxics Cleanup Program (TCP) has provided a new voluntary service for persons conducting independent remedial actions. Persons voluntarily requesting the Department's review and evaluation of their independent remedial action reports will pay Ecology's costs of providing the new service. Currently, Ecology can work only on the highest priority sites, in terms of environmental and public health concerns. Often, landowners or facility operators ask Ecology to review their remedial actions to help them meet lease conditions, limit future liability, sell property, or obtain bank loans to purchase potentially contaminated property. Since the review of independently conducted activities is not funded, the program must be completely supported by its users. The advanced payment will support the full-time equivalents (FTEs) [i.e., positions] necessary to provide this alternative service without taking state resources away from higher priority sites.

   The rule will clarify the process for how Ecology intends to continue to implement the authority under which this program was established.

   This voluntary user-supported service enables the Department to evaluate a greater number of independent cleanups, helps more sites get cleaned up, helps lenders and others involved in property transactions quantify potential risks at potentially

contaminated properties, helps property owners get their site removed from the Hazardous Sites List, and facilitates the return of once-contaminated property to productive use.

4. Finally, the rule amendment will make possible the availability of a prepayment provision to all persons involved in cleaning up contaminated property. Codification of the prepayment oversight option will allow PLPs greater flexibility and opportunity to enter into formal oversight agreements with the Department. This mechanism will be available to all persons who want Ecology oversight throughout the term of their cleanup.

   The purpose of a prepayment agreement is to enable Department oversight of remedial actions at lower priority sites. The advanced payment will support the FTEs necessary to provide this alternative oversight service without taking state resources away from higher priority sites. This rule amendment will allow individuals with smaller, less complex cleanup sites to use the prepayment method to gain Department oversight more quickly, even if their site is not a high priority to the Department.

SUMMARY OF PUBLIC INVOLVEMENT ACTIONS

Several activities were undertaken by Ecology to inform the public and provide public involvement opportunities in the development of this rule amendment. Throughout the rule amendment process, Ecology consulted with, and held regular meetings with, an external work group that represented a diversity of interest groups; mailed three Focus sheets to approximately 4575 interested or potentially affected persons that described the proposed rule amendments and provided notice of the public hearings scheduled by Ecology; and held public hearings in Olympia, Seattle, Spokane, and Yakima. Copies of the focus sheets can be found in Appendix Two.

Public comments were received by mail and at the public hearings. A list of the public hearing dates, locations, names of the individuals attending each hearing, and the names of all individuals submitting written comments and public testimony is provided below. A summary of all comments on the proposed amendments and Ecology's response to the comments follow this section.

Public Hearings: Location, Date, Number of Attendees:

1. Olympia, August 24, 1993, 7:00 p.m.
   General Administration Building, Room 150, 11th and Columbia

   No Attendees

2. Seattle, August 25, 1993, 7:00 p.m.
   Port of Seattle, Commissioner's Hearing Room, 2711 Alaskan Way

   12 Attendees: Don J. Bache, Mary Moloseau Goetz, Richard Gordon, Helen Kennedy, John Komorita, Mel Knutson, Kevin Murphy, Leslie Nellermoe, Larry Penberthy, Mike Sciacca, Steve Simmons, Marian Slaughter, and Charles Wolfe.

3. Spokane, August 25, 1993, 7:00 p.m.
   Spokane County Health District, 1101 W. College Ave.

   3 Attendees: Dale Arnold, Ozzie Wilkinson, and Frank Yuse.

4. Yakima, August 26, 1993, 6:30 p.m.
   Yakima Valley Regional Library, 102 N. Third St.

   4 Attendees: Michelle Bingle, Cindy O'Halloran, Philip Small, and Susan Smith.

Written Comments Submitted By:

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PUBLIC COMMENT AND ECOLOGY'S RESPONSE
WAC 173-340-550 PAYMENT OF REMEDIAL ACTION COSTS

Copies of all written comment letters received during the public comment period can be found in Appendix One. Public hearing testimony has been summarized and incorporated into the following comments. The testimony from the public hearings has been recorded on cassette and the cassettes are contained in the rule amendment file.

COMMENTS REGARDING INCENTIVES FOR INCREASING EFFICIENCY AND PRODUCTIVITY OF THE TOXICS CLEANUP PROGRAM

Comment 1

Several commenters, including Kris Backes, Mack Funk, Christel Holm, Eric Johnson, Kevin Murphy, Lael Prock, Gordon Rogers, and Stephen Simmons, made reference in their comments to "…a lack of incentives for government agencies to be efficient and productive…." In addition, many of these commenters expressed an assumption that the additional funds collected in cost recovery would be added to the appropriation of the Toxics Cleanup Program (TCP).

Response 1

Ecology agrees that there is a perception by the public that government lacks the incentive to be efficient. While private business has its customers as its ultimate critics, government has the general public, through its representatives in the legislature, as its ultimate critics. That does not negate the fact that program support costs are part of the real cost of remediating or overseeing the remediation of a site. The law states that persons liable under the MTCA shall be responsible for all remedial action costs. The most effective means of incentive to prevent pollution is to realize the true cost of remediation.

This rule change is not an attempt to enrich the budget of the TCP. Increased funds from cost recovery will not go directly to the program. For a discussion on the budget process, see comment and response #3, below.

The intent of this rule amendment is not to give Ecology authority to spend unappropriated funds, it is to bring the rule more into line with the intent of the MTCA which makes liable persons liable for all remedial action costs.

CHARGING TOO MUCH BECOMES IN ITSELF A DISINCENTIVE

Comment 2

One commenter, Eric Johnson, suggested that increasing costs too far may serve as a disincentive for cleanups and timely settlements, and asks that the Department not fund broader parts of the program on the backs of paying PLPs.

Response 2

Ecology is aware that increasing costs may serve as a disincentive to some PLPs. However, in establishing a cost recovery rate more closely based on the actual costs to Ecology (and therefore the taxpayers), an attempt is made to strike a balance between what is "reasonably attributable" to the cleanup of the site and what costs should be paid by the tax.

The true costs of remediation are not increased as a result of this rule change. The rule changes only who pays the costs attributable to environmental cleanup – the responsible persons or the general public.

COMMENTS REGARDING THE BUDGET PROCESS AND REVENUE FROM COST RECOVERY VS. REVENUE FROM TAX

Comment 3

Several commenters, including L. M. Billington, Kris Backes, Larry Feller, Del Fogelquist, Christel Holm, Richard Johnson, Marcia Newlands, Thomas Newlon, Larry Penberthy, and Lael Prock referred to the budget process, and indicated a possible misunderstanding of the process and any impacts on that process as a result of this rule change.

Response 3

The legislature must appropriate funds from the State and Local Toxics Control Accounts before Ecology (or any of the six other state agencies receiving Toxics Control Account spending authority) may spend those funds. Opportunity for public comment is built into the budget process for programs and agencies seeking appropriation from the State and Local Toxics Accounts. In addition to the budget process which every state agency follows, the Model Toxics Control Act (Chapter 70.105D RCW) requires that the Department "develop, with public notice and hearing, and submit to the ways and means and appropriate standing environmental committees of the senate and house of representatives a ranked list of projects and expenditures recommended for appropriation from both the state and local toxics control accounts." The most recent report was published in November 1992 for the 1993-1995 Biennium. It is available from the Department upon request (Publication #92-92).

For the 1993-1995 Biennium request, the Department conducted a detailed prioritization of all activities funded by the State Toxics Control Account in all programs that use those funds. In its prioritization process, Ecology considered which activities could be funded through other sources of funds, as well as, activities traditionally funded by other funds which were legal to fund through the Toxics Control Account. Mixing and matching was also considered between the State and the Local Toxics Control Accounts in an effort to fund the most essential activities in the most efficient way. The report describes the activities that would likely be funded, given the anticipated revenue level, as well as those activities which most likely would not be funded.

Sources of revenue to the State and the Local Toxics Control Accounts include the tax on hazardous substances, which accounts for all of the Local Account and about eighty-five percent of the State Account. Recovered funds are also deposited into the State Toxics Control Account and are not available to the Department for expenditure without an appropriation.

There is no guarantee that the legislature will appropriate additional funds for the TCP based on the effectiveness of its cost recovery program. The TCP will still be required to justify its requests for funds from the Toxics Control Account through the established appropriations process. The legislature will continue to decide where those monies will be spent.

INCLUSIONS AND EXCLUSIONS IN THE PROGRAM SUPPORT DEFINITION/CALCULATION

Comment 4

Several commenters including Philip Small, Yakima, Mike Sciacca, Seattle, Kris Backes, Michael Carey, Rod Hanson, Eric Johnson, William Kombol, Kevin Murphy, Marcia Newlands, and Kenneth Weiner, inquired about the specific inclusions in and exclusions from the program support calculation and ultimately the rate.

Response 4

In developing the proposed "program support" rate, the TCP management consulted an external work group consisting of members of PLP groups, attorneys, consultants, environmental groups, and local governments. After many discussions, it was agreed that a portion of the support functions of the program are attributable to the remediation of sites and thereby are the responsibility of PLPs, and another portion of those support functions should be borne by the general public.

The resulting program support rate excludes development of rules, policies and procedures and non-site-related public information/education functions. These functions will continue to be supported by the Hazardous Substance Tax.

For other categories of support (clerical, meetings, training, and management), the program support rate includes all of the costs in the TCP sections whose main purpose it is to remediate sites (regional offices and the Site Cleanup Section in headquarters) and half of the costs in the sections which are wholly support sections (Information and Financial Management, Policy and Technical Support, and Administration) are included. Changes are being made to the proposed language to clarify these inclusions/exclusions. Please see next comment.

COMMENTS REGARDING CLEARER DEFINITIONS, PUBLISHING ACTUAL RATES AND INSERTION OF REVIEW AND AUDIT PROVISIONS IN RULE

Comment 5

Some commenters, including Philip Small, Mike Sciacca, Kevin Murphy, Stephen Simmons, and Kenneth Weiner, suggested specific language to clarify the definition of program support and the calculation used to derive the rates used. Others suggested that audit provisions be included.

Response 5

As suggested by commenters, we have clarified the inclusions and exclusions from program support in the rule language and described the formula to be used in the calculation. We have looked into formally requesting that the U. S. Department of the Interior (USDOI) (our federal cognizant agency) audit our program support rate, as they do our Agency Support rate each year. However, formal audit by the USDOI will probably not occur until all Ecology programs implement a rate. This would require that all programs establish code structures capable of tracking support costs separate from direct costs similar to the way the TCP tracks its costs. In the meantime, the TCP is committed to seeking a formal audit of its program support rate by either the State Auditor's Office or a private contractor. Prior to publishing its intent to charge a program support rate, TCP sought the assistance of a private contractor to determine if our approach to defining and calculating a rate was reasonable. The consultant concurred with Ecology's approach.

Readers are referred to the amended language.

COMMENTS REGARDING THE TIMING OF IDENTIFICATION OF PLPS

Comment 6

Two commenters, Michael Carey and Eric Johnson, suggested the "liable" persons should be identified prior to remediating a site, and that all PLPs be sent bills for Ecology oversight costs.

Response 6

Ecology must balance the need for an expeditious cleanup with the desire to identify all persons who are potentially liable for the cleanup costs. Often it is not practicable to delay remedial activities until all PLPs are known. All PLPs who have been brought into the formal process under an order or decree are billed for Ecology'' oversight costs. Ecology intends to continue this billing practice. Those PLPs who receive a bill for Ecology'' oversight costs may pursue PLPs who have not been pulled into the process by Ecology through private rights of action.

Comment 7

Kenneth Weiner questioned the Department's commitment to several principles:

1. recovering only those costs reasonably attributable to a site;

2. preventing overlap between the agency support and program support costs to avoid double-charging for overhead; and

3. continuing to engage in negotiations and resolving disputes with PLPs related to oversight billings.

Response 7

The Department remains committed to each of these principles.

1. The costs of program support are costs that are reasonably attributable to a site. By comparison, private business owners charge back (through their pricing structure) the cost of their own time, their secretary's time, time spent in general activities not specifically related to a single product or service, etc.

2. The accounting system (a statewide system, the Agency Financial Reporting System, or AFRS) positively prevents charging in more than one category, or double-counting.

3. PLPs will always have the right to dispute the cost recovery bills Ecology issues. The rule amendment may change the amount billed, but not the ability of a PLP to dispute specific charges or negotiate cost recovery options.

COMMENTS REGARDING THE INVOICE AND DOCUMENTATION FOR STAFF AND NON-STAFF CHARGES

Comment 8

There were several questions from Dwight Hagihara, Kevin Murphy, Marcia Newlands, and Lael Prock regarding the documentation which Ecology intends to send with invoices under the new system.

Response 8

Invoices will be documented with reports of time charged by each staff person who charges directly, and the hourly rate charged for each staff person according to classification. Support costs will not be directly charged. A rate which is the equivalent of the average of all applicable support costs as a percentage of all site-related costs will be applied to each salary rate to determine the hourly rate charged for each classification of employee. As is the case currently, site logs detailing the activities of the staff members who charge directly will be available upon request. Non-staff costs will be itemized.

COMMENTS REGARDING THE BENEFIT OF THE COST INCREASE TO THE PLP

Comment 9

One commenter, Kevin Murphy, asked what increase in service a potentially liable person would realize from the increased costs.

Response 9

The intent of the rule is not to increase costs to provide an increased level of service. In the past, PLPs were receiving a service without paying the full costs of that service. Consistent with the philosophy of the MTCA, the rule amendment shifts the burden of paying the true costs of state oversight from the general taxpayers to the individuals responsible for cleaning up contaminated sites.

COMMENTS ON INTRODUCTORY PARAGRAPH

Comment 10

Conflicting comments were received regarding the need for the introductory paragraphs to this section of the rule:

Ken Weiner and Mack Funk commented that the introductory paragraphs to this section of the rule are not necessary because the paragraphs either restate the statute or provisions in the existing MTCA rule, or overreach them.

Kris Backes, Thomas Newlon, and Kevin Godbout commented that Ecology should expand the preamble to further explain the concept and intent of the agency in issuing these rules. In their opinion, the statement of intent should indicate that the Department would seek to avoid rigid interpretations of the regulation that would unduly limit private rights of action, and that a determination of "substantial equivalence" cannot be rejected on minor technical deviations from the regulation. It was also noted that a statement needs to be added that the intent is to encourage independent cleanups.

Several of these persons also had suggested editorial changes to the introductory paragraph.

Response 10

The statements duplicating the language already in the statute has been removed. Other language helping to explain the intent of this section has been modified and expanded somewhat to address these concerns. Many of the suggested editorial changes have been incorporated into the final rule.

COMMENTS ON 550(5)(a) AND (b)

Comment 11

Kris Backes, Mack Funk, Thomas Newlon, Eric Johnson, and Kevin Godbout commented that subsections 550(5)(a) and (b) are unnecessary and should be deleted. Most were concerned that these provisions would limit the ability of PLPs to initiate contribution actions by requiring payment to Ecology before initiating a court action against another PLP. One individual noted that these provisions essentially restated the obvious and are not needed.

Response 11

These subsections were not intended to restrict the ability of PLPs to file private rights of action. Rather, they were intended to make it easier to seek contribution in these instances.

Paragraph (a) was intended to make it clear that when the Department conducts a remedial action and a PLP reimburses the Department for its costs, this is "substantially equivalent to a department-conducted remedial action." While this appears to be restating the obvious, it was felt important to do this, given the court's recent narrow interpretation of the MTCA regarding contribution. In fact, the Department has recently become aware that a case has been filed claiming that the private right of action provisions of the MTCA apply only to independent remedial actions. The Department believes this was not the intent of the legislature.

The primary underlying objection to paragraph (a) appears to be related to the language referring to payment of the Department's costs. Again, it was not the intent of the Department to create a new mechanism for enforcing payment of its remedial action costs. This language was included since the Department was under the impression that there would not be a reason to seek contribution until some expense had been incurred by paying the Department for at least a portion of the remedial action the Department has conducted. Upon further review, it is conceivable that a PLP could seek contribution prior to actually paying the Department.

In light of this discussion, this provision will be modified to delete the statement requiring payment of the Department's remedial action costs. In doing so, however, it should be noted that the Department will not normally allow delayed payment of its remedial action costs until contribution actions have been resolved in the courts – a process that could take several years. The Department believes such a delay would be inconsistent with the intent of the MTCA. PLPs refusing to pay these costs could be subject to the interest and penalty provisions of the MTCA.

Paragraph (b) was intended to make it clear that remedial actions conducted under an MTCA order or decree would be considered "department-supervised" and therefore qualify for private rights of action. Again, this may appear to be restating the obvious, but it was felt important since the Department often provides technical assistance on sites outside the formal order/decree process. Such assistance would not qualify a site as "department-supervised."

An underlying concern with paragraph (b) appears to be the reading into this section that failure to pay the Department's oversight costs could result in the rejection of the contribution action. Language requiring payment of the Department's oversight costs was present in earlier drafts of the rule, but was eliminated in this proposed version. While not specifically called out in the rule, payment of these costs is usually an integral requirement of an order or decree. As such, it is conceivable that a court would not find a remedial action to be substantially equivalent to a Department-supervised remedial action unless most of the Department's oversight costs were paid.

It is not the Department's intent to create a new enforcement mechanism for payment of its costs through this provision. Accordingly, the final rule has been revised to refer to compliance with the "remedial" requirements of an order or decree. In making this change, however, it is not the Department's intent to allow delayed payment of its costs until contribution actions have been resolved in the courts, a process that could take several years. The Department believes such a delay would be inconsistent with the intent of the MTCA. PLPs refusing to pay these costs could be subject to the interest and

penalty provisions of the MTCA. It is also not the intent of this change to in any way waive a PLP's responsibility to fully comply with an order or decree.

Comment 12

Jeff Belfiglio requested language be added indicating cleanup work done under an authority other than the MTCA be considered eligible for private rights of action under the MTCA.

Response 12

The recent amendment to the MTCA to provide for private rights of action addresses only remedial actions under the MTCA. Presumably, if the legislature intended a similar right of contribution under other state laws, similar language would have been included in those other laws.

Ecology believes it is beyond its authority to authorize private rights of action under the MTCA for cleanup costs incurred under other laws. Persons who conduct remedial actions under other laws can claim a private right of action for their work as an independent remedial action under the MTCA if they have complied with the requirements of this section. Persons may also have other common law remedies and may seek legal advice on these potential approaches.

Comment 13

Melvin Knutson commented that the requirement that cost recovery be allowed only if the cleanup is "the substantial equivalent of a department-conducted or department-supervised remedial action" be deleted.

Response 13

This phrase in the proposed rule was merely restating the statutory requirement for seeking a private right of action under the MTCA. Since this is a statutory requirement, it is a prerequisite for filing an action and cannot be modified by the Department through rule.

Comment 14

Helen Kennedy, and Melvin Knutson commented that a private right of action should not be limited to just PLPs. Mr. Knutson suggested adding "…property owner or other person…" to section 550(5)(c)(ii).

Response 14

Neither the statute nor this rule is intended to limit private rights of action to just PLPs (the statute specifically uses the term "person"). Section 550(5)(c)(ii) was intended to

parallel language in WAC 173-340-510 regarding Department objections to independent remedial actions. This subsection has been revised in the final rule to make it clear that private rights of action are not intended to be restricted to just PLPs

COMMENTS ON REPORTING REQUIREMENTS

Comment 15

Jeff Belfiglio and Ken Weiner requested that the provision requiring compliance with the reporting requirements of WAC 173-340-300 and 173-340-450 be deleted. Mr. Belfiglio was particularly concerned that failure to meet the requirement in WAC 173-340-450 to report UST releases within 24 hours could impair the ability to seek contribution. He also noted that he felt the reporting requirements were vague and could cause confusion as to when to report. Mr. Weiner suggested the 15-day notice requirement contained in the proposed rule be substituted for the reporting requirements in these sections.

Response 15

The Department believes the reporting requirement provision should be retained. Reporting of releases requiring remedial action and documenting and reporting the remedial actions taken are already requirements of the MTCA regulations. This is part of the Department's overall program for discovery of contaminated sites, provided for by statute. In order for a cleanup to be conducted or supervised by the Department, the Department would have to know about it. Thus, to be "substantially equivalent" it would make sense that the site and remedial actions conducted at the site would have to be reported to the Department.

As for the potential for a technical violation of these reporting requirements to restrict the ability of a person to seek a private right of action, it is not the intent of the Department to do so. Additional language has been added to the introductory paragraph emphasizing that technicalities should not be used by the court to keep a private right of action from being heard.

The requirement for reporting underground storage tank (UST) releases within 24 hours of discovery is a requirement under federal UST as well as state UST regulations. It applies only to tanks regulated under these programs. Again, the Department would not expect a technical violation of this provision to preclude a private right of action.

Regarding the concern about the vague nature of the reporting requirements, the Department has previously prepared guidance on what to report (see Policy 101 and 102.) The essential requirements of the existing rule and policy state that when a person discovers a release that needs remedial action, the release must be reported to the Department. A report documenting the remedial actions conducted to address the release must be submitted to the Department once the work has been completed. If a person has decided to take a private right of action, it is presumably because they have decided that the release meets the reporting threshold under the MTCA and needs remedial action.

The Department does not concur that the 15-day notice requirement should substitute for the reporting requirements in these sections. For leaking underground storage tank sites, the reporting requirements are necessary for delegation of the federal UST program; changing them would jeopardize the Department's delegation and funding for this program. For other sites, the Department believes that the requirements of WAC 173-340-300 should still apply because the reporting requirements provide the Department with information that would not be available under the 15-day notice requirements of this section.

COMMENTS ON THE PUBLIC NOTICE REQUIREMENTS

Comment 16

Kris Backes commented that subsections C through E of 550(c)(iii) should be deleted. The requirements are narrative, unnecessary, and too prescriptive. Jeff Belfiglio echoed these concerns, indicating the public notice requirements should be stated in more general terms. He was concerned that a technical error like failing to post a sign could result in not having a private right of action.

Response 16

Public notice of cleanup activities is a key element of cleanups under the MTCA (see RCW 70.105D.030(2)(a)) and the federal Superfund program. Under Superfund, the nature of the public notice given and timing has often been a point of contention in contribution actions. To minimize this becoming a similar roadblock in MTCA private rights of action, the public notice requirements have been simplified and made more explicit in the draft rule. The Department believes this approach should be retained in the final rule. It is not the intent of the Department that a technical violation of these public notice procedures would restrict a person's ability to seek a private right of action. Additional language has been added to the introductory paragraph that emphasizes technicalities should not be used by the court to keep a private right of action from being heard. Several comments were made on the specific requirements in this subsection, and these are addressed below.

Comment 17

Ken Weiner commented that a PLP should be able to combine public notice requirements with any notices required under another law.

Response 17

The Department concurs with this suggestion and a provision providing for this has been added to the final rule.

Comment 18

Kris Backes and Thomas Newlon commented that the 15-day public notice period is excessive. Daryl Grigsby commented that the 15-day notice period was totally inadequate. He stated notification should occur prior to the start of planning for the cleanup so that his agency could provide expertise and minimize its potential share of the cleanup costs.

Response 18

In earlier drafts of this rule, Ecology had proposed a 30 day comment period since this is the length of the comment period used for orders and decrees issued under the MTCA. Several reviewers objected to this length of a comment period indicating it could impede property transactions. As a result the comment period was reduced to 15 days. This length of time is consistent with the notice requirement for determinations of nonsignificance under SEPA which most agencies and organizations have found workable. Also, 15 days should not result in project delays in most circumstances since it often takes this long to obtain any needed permits, obtain bids, and get a contractor on site to do the work.

The concern expressed by METRO about wanting to be notified early in the planning stages to help control costs is an important one. If a PLP waits until just 15 days prior to beginning construction work to notify others about the cleanup, meaningful involvement in the decision-making process may be precluded. For small sites where the cleanup action needed is readily apparent, this presents little difficulty. However, for more complex sites where a number of alternatives could achieve an acceptable cleanup, waiting to notify others of the cleanup could invite arguments that the cleanup is "gold plated." For this reason, language was included in the proposed rule that recommends notification be given once a decision had been made that the cleanup was needed and engineering design had begun. One person indicated this section was confusing and suggested it be deleted and replaced with a statement that notification before the 15-days is acceptable. Ecology agrees the draft rule is confusing in this area, but believes a stronger statement is needed than simply saying earlier notification is acceptable. The final rule has been changed to recommend (but not require) earlier notification for complex sites. It is not the intent of this change to invite litigation over what is a complex site. That is why the statement was expressed as a recommendation. A PLP can satisfy the public notification requirement with the 15-day notice. This recommendation for earlier notification has been included in the rule to alert PLPs that earlier notification makes sense in some instances.

Comment 19

Ken Weiner, Mack Funk, and Eric Johnson commented that Ecology should provide a summary of the public notices in the Site Register.

Response 19

The Department agrees that a statement should be placed in the Site Register that indicates a notice has been received and the final rule has been revised to reflect this commitment.

Comment 20

Ken Weiner and Mack Funk commented that public notice provisions in the proposed rule amendment and the existing provisions of WAC 173-340-300 and WAC 173-340-600 are not clear and may be conflicting. Ecology should review the relationships between these provisions and clarify notice requirements in the final rule.

Response 20

This section of the rule is not intended to supersede the reporting requirements in WAC 173-340-300 or WAC 173-340-450. The notice detailed in this section is in addition to that in these other sections. It is, however, intended to replace the public notification requirements in WAC 173-340-600 by providing more specific requirements for independent cleanup actions. Statements clarifying this relationship have been added to the final rule, including a statement added to WAC 173-340-300(4) cross-referencing WAC 173-340-550.

Comment 21

Eric Johnson, Tom Newlon, and Kris Backes commented that the requirement to notify all PLPs "known" to the person conducting the cleanup is problematic. Of particular concern is the level of research needed for a person to meet this requirement to make certain that no one had been left out.

Response 21

Ecology's intent in including this requirement in the rule was to ensure that PLPs who are likely to be sued under a private right of action have had notice in the cleanup was occurring. Ecology's expectation was that PLPs who are technically or financially capable to contribute, would start discussions with the person doing the cleanup. Furthermore, this requirement is intended to help minimize cleanup transaction costs. If PLPs subject to a contribution claim are involved early in the cleanup, it will be more difficult for them to claim that the cleanup was "gold plated" as an excuse for not having to pay their full share.

Ecology recognizes this language imposes an obligation on the person conducting the cleanup to research records to identify other PLPs. It seems only fair, however, that persons who are likely to be required to pay for the cleanup be made aware that the cleanup is underway. This PLP notification normally occurs for cleanups conducted by the Department or under an order or decree, and so a notification requirement should be included for a remedial action to be substantially equivalent of a department-conducted or department-supervised remedial action.

To minimize concerns that this language could be meddlesome, an explicit statement has been added to the final rule indicating the level of effort expected for persons to comply with this provision. The intent here is not to preclude the person conducting the cleanup from seeking a private right of action from another PLP simply because the PLP was not notified before remedial action was begun. This is an example of an omission, as stated in the opening paragraph to 550(5), that could still result in the remedial action being substantially equivalent when "evaluated as a whole." Lastly, it should be noted that Ecology does not normally conduct an extensive PLP search at most sites and Ecology would not expect a PLP to have to conduct one to ensure their cleanup qualifies as substantially equivalent.

Comment 22

Kris Backes expressed concern with the requirement that "all land owners" be notified.

Response 22

Ecology's intent with this provision was to ensure that persons who own the land where the remedial action is occurring are notified about the remedial action. Not only could these persons be PLPs who could be sued for contribution, they also have a long-term stake in the outcome since the value of the property could be affected by the quality of the cleanup. Ecology understands that a concern with this provision is that there may be owners with a hidden interest in the property who, if not notified, might preclude a private right of action. To address this concern, additional language has been added to the final rule indicating this notice be given only to the landowner(s) identified in the tax assessor's records at the time the interim action or cleanup action commences.

Comment 23

Mack Funk and Eric Johnson commented that public notice to landowners and PLPs be to "the last known mailing address" to avoid an undue burden on the party conducting the cleanup.

Response 23

This language has been added to the final rule.

Comment 24

Jeff Belfiglio suggested a statement be added indicating that cleanup actions conducted prior to the effective date of this subsection can still be found substantially equivalent "as a whole" even if little or no public comment was provided for.

Response 24

Public notification is a key provision under the MTCA. The Department believes the courts will likely decide some level of public notice would have been needed to be done to be substantially equivalent "as a whole." We recognize that most independent remedial actions done to date have had little prior public notice. A statement to this effect has been added to the final rule so that the courts understand that Ecology was aware of this practice. Also, a statement has been added to the introductory paragraph making it clear that omissions such as lack of public notice should not preclude a private right of action as long as the overall effectiveness of the remedial action is not diminished.

TECHNICAL REQUIREMENTS

Comment 25

Stephen Simmons commented that subsection 550(5)(c) should be rewritten to require strict compliance with the referenced sections as a prerequisite to a private right of action.

Response 25

This comment is in direct conflict with the comments of several other reviewers. All other reviewers suggested strict compliance with the provisions of the MTCA should not be a requirement for a private right of action. Ecology agrees. The statute uses the phrases "substantially equivalent" and "as a whole." Ecology believes these phrases indicate a strong legislative intent that a technicality not prevent a person from seeking a private right of action. The final rule maintains this philosophy.

Comment 26

Ken Weiner, Tom Newlon, and Mack Funk expressed concerns with the reference to "procedures" in subsection (iv). Ken Weiner suggested this term be replaced with the phrase "evaluation criteria."

Response 26

Many of the sections identified contain a number of requirements that could be viewed as procedural. An example of this is the process described in WAC 173-340-360 for the selection of a remedy. Ecology's intent of including "procedures" in the requirements was to ensure these narrative evaluation criteria were included in any substantial equivalency determination. It was not Ecology's expectation that other procedural requirements, for example, the preparation of a cleanup action plan, would be followed in independent cleanup actions. While a cleanup action plan is not required, some sort of document describing the logic behind the remedy selected would be necessary. Ecology concurs that the phrase "evaluation criteria" best captures this intent, and this provision has been changed in the final rule.

Comment 27

Mack Funk, Tom Newlon, and Ken Weiner suggested additional wording be added to clarify that other documents with substantially the same information could be used in lieu of those identified in the rule.

Response 27

A statement to this effect has been added to the final rule.

Comment 28

Jeff Belfiglio requested the term "consistent" be replaced with "substantially equivalent."

Response 28

While the term "consistent" was used in earlier drafts of the rule, the proposed draft does use the term "substantially equivalent." This language is retained in the final rule.

Comment 29

Ken Weiner suggested the following statement be added to this subsection: "This section does not require a party to have made the same decision or choice of remedy as the department."

Response 29

The Department recognizes that there are usually many alternative methods of studying and cleaning up a contaminated site. This statement seems to imply more than this, however, since a PLP following the same standards and evaluation criteria should end up with decisions similar (although not necessarily identical) to those the Department would have made. To address this concern, a statement recognizing that there are often many alternative methods for remediating contaminated sites has been added to the final rule.

COMMENTS ON THE HANDLING OF CLEANUP RESIDUALS

Comment 30

Kris Backes and Thomas Newlon commented that requirements of subsection 550(5)(c)(v) are unnecessary and should be deleted.

Kevin Godbout commented that the requirements of WAC 173-340-550(5)(c)(v) would increase the costs of conducting an independent cleanup by increasing non-essential documentation requirements.

Response 30

Ecology has become aware of situations where contaminated soils removed during a cleanup at one site have been transported to another site for disposal, creating a second

contaminated site. While the standards for proper disposal of cleanup residuals would be determined by an analysis of other applicable, relevant, and appropriate requirements (ARARs) as required by WAC 173-340-710, Ecology believes it is important to state this expectation explicitly in the rule. To make it clear that Ecology's primary concern is the proper disposal of cleanup residuals, the reference to treatment has been deleted.

It is not Ecology's intent to create excessive documentation requirements as a result of this provision. For example, if off-site disposal has occurred, it would be sufficient to have records indicating that the residuals have been disposed of at a permitted solid waste or hazardous waste landfill. Usually a disposal facility provides receipts upon payment of disposal fees. A copy of such receipt would be sufficient to meet this requirement. The final rule retains this documentation requirement and includes an additional explanation of Ecology's intent.

Comment 31

Mike Siacca, Mark Robinson, Cristel Holm, and Jane Asbury commented that the $1,000 minimum submittal fee seems too high, especially for small businesses or home owners, or small-scale cleanups.

Response 31

The $1,000 fee covers such activities as: report review, a site visit, limited sampling and analysis by Ecology (at some sites), the Site Register publication of Ecology's decision regarding the site, management of the site data base, activities necessary to remove a site from the Hazardous Sites List, and for sites where the cleanup costs less than $50,000, a written determination about the remedial actions performed. In some cases this determination will require a detailed identification of deficiencies in the remedial actions or the reporting of those actions.

See response to Comment 38.

Comment 32

J. Alvin Arkills and Rod Hansen commented that the voluntary fee does not provide fair and equal access to the public services that Ecology should already be providing. By assessing the $1,000 submittal fee, the Department would be limiting the number of small, independent remedial action reports it receives.

Response 32

The fee should not negatively impact the number of independent remedial action reports received. Under the existing rule, individuals are required to submit the results of their independent interim and cleanup actions within 90 days of completion. This reporting requirement will not change with the rule amendment. The independent program will only allow individuals the option of having those reports reviewed by the Department.

If property owners wish, they may submit their independent remedial action reports consistent with the MTCA and wait until their site reaches a high enough priority for Ecology to initiate work on its own.

Currently, there is no MTCA requirement, or resources available to work on anything but the highest priority sites, in terms of the threat the site poses to human health or the environment. Individual landowners, however, may consider their site a high priority to them because of an impending property transaction, future liability concerns, or some other reason.

The fee is required to cover the Department's costs of providing this otherwise unfunded and unavailable activity. Many persons would like access to the service. It is Ecology's

opinion that property owners willing to pay for the service should not be denied the service because such service is not wanted or affordable to all property owners.

Comment 33

Kris Backes commented that support costs (determined as a percentage of direct costs) associated with the review and evaluation of independent remedial action reports should not be greater than those support costs proposed in section 550(2).

Response 33

Effective July 1, 1993, Ecology established a fee structure to recover the costs associated with the review of independent remedial action reports. This fee structure is based a percentage of the cleanup action costs with a minimum fee of $1,000 and a maximum fee of $15,000. The proposed rule commits Ecology to evaluating this fee structure by July 1, 1994 and on an annual basis thereafter. Any revision to the amount Ecology charges for the review of independent remedial action reports will, on average, cover support costs as established through WAC 173-340-550(2).

Comment 34

Kris Backes commented that "A mechanism to review and provide comments on the proposed fee schedules should be identified in the rule."

Response 34

This fee schedule which Ecology implemented on July 1, 1993, was established with the assistance of an external work group representing a wide range of interest groups. The proposed rule amendment commits Ecology to evaluating the fee structure by July 1, 1994, and on an annual basis thereafter. Ecology will continue to seek input from the external work group participants when revising the fee structure.

Comment 35

Kris Backes expressed a concern that a separate fee would not be imposed to remove a site from the Hazardous Sites List once Ecology determines that no further action is required at a site.

Response 35

It is correct that a separate fee will not be charged to remove a site from the Hazardous Sites List once Ecology determines that "no further action" is required. If a report addresses interim actions at a site, a "no further action" designation may be granted for the specific remediation performed, but the site or portions of the site, would remain on the Hazardous Sites List until all MTCA concerns have been addressed. It is Ecology's intent to require a resubmittal fee only when repeated efforts to obtain sufficient information have failed.

Comment 36

Several commenters – Kris Backes, Kevin Murphy, Mark Robinson, and Lael Prock, expressed concerns about the possibility of excessive additional filing fees being assessed because reports are failing the initial screening review. They would like Ecology to ensure an equitable resolution of questions and minor deficiencies, to avoid the likelihood of multiple submittals of an independent remedial action report and the associated multiple fees, and to be clear about the criteria used to determine whether a report or remedial action is "deficient" and must be resubmitted.

Response 36

The MTCA cleanup regulation and the guidance on preparing independent remedial action reports define the standards and criteria Ecology will use to determine if a report or remedial action is deficient.

Ecology regional staff are providing up-front assistance to any individual requesting help submitting independent remedial action reports, to make certain reports are complete prior to their submission to Ecology. In addition, if only minor omissions exist in a report, Ecology staff will make reasonable efforts to obtain the missing information before sending the report back as inadequate.

If, however, the individual does not respond to Ecology requests for information or consistently deviates from available guidance on preparing independent remedial action reports, then a report will be returned and an additional fee will be required if the individual wishes to resubmit.

It is Ecology's intent to require a resubmittal fee only when repeated efforts to obtain sufficient information have failed.

Comment 37

Kris Backes commented that Ecology should provide written notification of insufficiency with a detailed explanation of the reasons for such a determination. The Association of Washington Business suggests the following language be added to 550(7):

"(c) If review and evaluation of an independent remedial action report submitted under WAC 173-340-300(4) is determined to be deficient by the department, the department will provide in writing within 90 days of either a preliminary or detailed review:

1) the criteria used to evaluate the adequacy of the remedial action, and
2) a summary of the areas of deficiencies for the remedial action."

Response 37

The proposed rule amendment has been changed to reflect the fact that Ecology will provide a detailed letter specifying the deficiencies with a remedial action or the information presented in the report.

Comment 38

Del Fogelquist, Cristel Holm, Rod Hansen, and L.M. Billington suggested that the Hazardous Substance Tax should be used to cover all of Ecology's needs for MTCA, including the review of independent remedial action reports.

Response 38

The review of independent remedial actions is an activity which has not received the level of attention from Ecology that the regulated community has requested. Ecology has not been able to respond to these requests because monies appropriated from the toxics account are used at the highest priority sites first. Most sites being cleaned up independently are lower priority for Ecology, and work would not normally begin at these sites for many years. The independent program allows individuals the option of getting sites looked at earlier than normally possible. The program cannot be supported by toxics account dollars – must be supported by the users wishing to elevate the priority of their site for personal reasons.

Participation in the Independent Remedial Action Program (IRAP) mandatory to satisfy state requirements under the Model Toxics Control Act. Many individuals are requesting the service provided by the program, and are willing and able to pay the costs associated with the review of their independent remedial action report. Properties do not lose their usefulness because a property owner or operator does not obtain an assurance from Ecology that their cleanup has been conducted per MTCA standards.

Some lenders and property owners may find enhanced value in properties that have obtained a no further action letter from Ecology and have been removed from the Hazardous Sites List, and they are willing to pay the costs of Ecology providing the service. It is unreasonable to deny willing participants access to the service because others will not choose to participate. The current fee schedule will be evaluated and adjusted after the first year.

Comment 39

Mack Funk commented that the Port is pleased the Department is moving to implement the Independent Program, as long as the fee structure is reasonable, and the Department is prepared to issue meaningful no further action letters and delist sites based on reasonably thorough independent investigations and cleanups.

Response 39

This is Ecology's intent in developing the program.

Comment 40

Ken Weiner commented that the Department should not establish a fee for independent reviews if the Department collects these sums but does not provide a reasonable review and regularly refuses to issue no further action letters and delist sites. He recommends the following language addition to the rule:

> (7)(c) In conducting reviews under this subsection, it is the department's policy to promote independent cleanups by delisting sites or portions of sites wherever possible and whenever petitions and supporting documents show reasonable efforts to characterize and address contamination. Because the department retains the right to relist sites or require further action if problems arise in the future, and is not resolving liability by providing a covenant not to sue, these requests or petitions will be reviewed accordingly, and not as if the department were entering into a consent decree.

Response 40

The revised rule language incorporates the intent of this proposal.

Comment 41

Similar to comment 40, Eric Johnson commented that the Port Association is supportive of the proposal to create an independent cleanup review system funded by a reasonable fee. But to be successful, the review process will need to issue unequivocal no further action letters, and be willing to accept reasonable risk assumptions based on thorough independent cleanups.

Response 41

See response to comment 40.

Comment 42

Lael Prock, Kevin Murphy, and Kris Backes expressed concern regarding the timelines for the review of independent remedial action reports by Ecology.

Response 42

Ecology's intent is to provide expeditious reviews. We plan to track turn-around times to make certain adequate staffing is available to manage the demand for independent reviews.

Comment 43

Kevin Godbout commented that Weyerhaeuser supports the proposed amendment regarding the IRAP. Weyerhaeuser is encouraged by the willingness of the Department to make regulatory changes which better match the needs of responsible parties that willingly conduct site cleanups, but would be concerned if the proposed fee program were instituted on a mandatory basis.

Response 43

Comment noted.

Comment 44

Kevin Murphy commented "If property is to be sold, transferred or used as collateral for a bank loan, a determination from the State as to the adequacy of the cleanup is essential." The proposed IRAP is desperately needed in Washington. Ecology's recognition of this fact is applauded, and efforts to create a program appreciated.

Response 44

Comment noted.

Comment 45

Rod Hansen commented that the IRAP as a whole does not provide a solution to the problem of too many independent cleanup reports and too few staff to review them. The fee has not been dedicated to hiring new staff or creating a new section within Ecology to address independent cleanups. Instead, the program will divert staff time away from high-priority sites.

Response 45

Ecology will not divert staff dedicated to work on high-priority sites for the IRAP.

The IRAP was not established to address the entire realm of independent remedial action reports submitted to Ecology. It was intended only to provide persons conducting independent cleanups the possibility of receiving some level of review by Ecology to help facilitate property transactions, increase the number of independent cleanups the Department can review, and provide better guidance to individuals conducting independent cleanups.

If the IRAP cannot support itself, the staff positions currently dedicated to independent reviews will be lost. If this happens, Ecology will not be able to review many independent remedial action reports, or provide the determination requested by property owners and/or the lending community unless the site is prioritized for Ecology action through the formal MTCA process, or the property owner enters into a prepaid oversight agreement with Ecology. See response to comment 38.

PUBLIC COMMENT AND ECOLOGY'S RESPONSE
WAC 173-340-550(8) PREPAYMENT OF COSTS

Comment 46

Thomas Newlon, Mack Funk, Eric Johnson, and Ken Weiner commented that they do not think a party should be required to accept status as a potentially liable person to enter into a prepayment agreement. With this requirement removed, they are supportive of the prepayment amendment.

Response 46

Suggestion incorporated, see revised language.

Comment 47

Kevin Godbout supports the proposed amendment but states that Ecology should adequately staff and budget the existing MTCA initiatives prior to implementing new ones. "Only under limited circumstances should funding be reallocated or staff be reassigned to support this initiative."

Response 47

The prepayment option allows Ecology to hire staff with funds provided by the party entering into a prepayment agreement. The prepayment option established because there was an expressed need to provide agency oversight at lower priority cleanups without reallocating funding or staff dedicated to Ecology's priority sites. Under prepayment agreements, staff are funded and dedicated to work only on the site(s) involved in the prepayment agreement.

OTHER COMMENTS AND ECOLOGY'S RESPONSE

Comment 48

Frank Yuse, Ecology Regional Citizen's Advisory Committee member, Spokane, stated a concern with the image projected by the department. He thinks that the citizen's advisory committees are tolerated by the professionals, but not used sufficiently or professionally. He thinks the committees should be used as a sounding board or liaison between the department and the public.

Response 48

This comment is beyond the realm of the rule amendment, but it has been passed on to appropriate headquarters and regional staff to be addressed through other means.

CHANGES TO THE PROPOSED RULE
BASED ON PUBLIC COMMENT

WAC 173-340-550

WAC 173-340-550 Payment of remedial action costs

(1) No changes

(2) Costs. Each person who is liable under chapter 70.105D RCW is liable for remedial action costs incurred by the department. Remedial action costs are costs reasonably attributable to the site and may include costs of direct activities, support costs of direct activities and interest charges for delayed payments. ~~As used in this subsection, costs of direct activities and support costs of direct activities mean the following:~~The department may send its request for payment to all potentially liable persons who are under an order or decree for the remedial action costs at the site. The department shall charge an hourly rate based on direct staff costs plus support costs. It is the department's intention that the resulting hourly rate charged be less than the hourly rate typically charged by a comparably sized consulting firm providing similar services. The department shall use the following formula for computing hourly rates:

Hourly Rate = DSC + DSC(ASCM) + DSC(PSCM), where,

DSC = Direct Staff Costs defined in (a) below,
ASCM = Agency Support Cost Multiplier defined in (b) below, and,
PSCM = Program Support Cost Multiplier defined in (c) below.

(a) Costs of direct activities are direct staff costs and other direct costs. Direct Staff Costs (DSC) are the costs of hours worked directly on a contaminated site, including salaries, retirement plan benefits, social security benefits, health care benefits, leave and holiday benefits, and other benefits required by law to be paid to, or on behalf of, employees. Other Direct Costs are costs incurred as a direct result of department staff working on a contaminated site including, for example, costs of: travel related to the site, printing and publishing of documents about the site, purchase or rental of equipment used for the site, and contracted work for the site.

(b) ~~Support costs of direct activities are agency support costs and program support costs, each expressed as a multiplier of the direct staff costs and described as follows: (i)~~ Agency Support Costs are the costs of facilities, communications, personnel, fiscal, and other state-wide and agency-wide services. The Agency Support Cost Multiplier (ASCM) used shall be the agency indirect rate approved by the agency's federal cognizant agency (which, as of July 1, 1993, was the United States Department of the Interior) for each fiscal year.

~~(ii)~~ (c) Program Support Costs are the costs of administrative time spent by site managers and other staff who work directly on sites and a portion of the cost of management, clerical, policy, computer, financial, and other support provided by other program staff to site managers and other staff who work directly on sites. Other activities of the toxics cleanup program not included in Program Support Costs include, for example, community relations not related to a specific site, policy development, and a portion of the cost of non-site management, clerical, policy, computer, financial, and other support staff. The Program Support Cost Multiplier (PSCM) used shall calculated by dividing actual Program Support Costs by the Direct Staff Costs of all hours charged to site related work. This multiplier shall be ~~revised~~ evaluated at least biennially and any changes published in at least two publications of the Site Register. The calculation and source documents used in any revision shall be audited by either the State Auditor's Office or a private accounting firm. Audit results shall be available for public review. This multiplier shall not exceed 1.0 (one).

(3) No Changes
(4) No Changes

(5) Private Rights of Action. ~~Under the Model Toxics Control Act, a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs, unless such claims are barred by RCW 70.105D.040 (4)(d). Under the Act, recovery of remedial action costs are limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action.~~ The purpose of this subsection is to facilitate private rights of action and minimize department staff involvement in these actions by providing guidance to potentially liable persons and the court on what remedial actions the department would consider ~~as~~ the substantial~~ly~~ equivalent of a department-conducted or department-supervised remedial action. ~~Nothing in this subsection is intended to contradict other provisions of this chapter. In determining substantial equivalence, the department anticipates this chapter will be construed in its entirety.~~ In determining substantial equivalence, the department anticipates the requirements in this subsection will be evaluated as a whole and that a claim would not be disallowed due to omissions that do not diminish the overall effectiveness of the remedial action. For the purposes of this section, the department would consider the following remedial actions to be the substantial~~ly~~ equivalent ~~to~~ of a department-conducted or department-supervised remedial action.

(a) A remedial action ~~that has been~~ conducted by the department; ~~and payment of the department's remedial action costs has been made to the department for those portions of the remedial action for which the private right of action is being sought;~~

(b) A remedial action that has been or is being conducted under an order or decree and the remedial requirements of the order or decree have been satisfied for those portions of the remedial action for which the private right of action is being sought; or

(c) A remedial action that has been conducted as an independent remedial action that includes the following elements: ~~that, when evaluated as a whole, addresses the following elements. Strict compliance with the following elements, while preferable, should not be a prerequisite to a private right of action.~~

(i) Information on the site and remedial actions conducted has been reported to the department in accordance with WAC 173-340-300 and WAC 173-340-450, as applicable;

(ii) The department has not objected to ~~the potentially liable person conducting~~ the remedial action being conducted or any such objection has been cured as determined by the court; ~~and~~

(iii) Except for emergency remedial actions, prior to conducting an interim action or cleanup action, reasonable steps have been taken to provide advance public notice. The notice may be combined with any notices under another law. These public notice procedures apply only to interim actions or cleanup actions conducted as independent remedial actions after the effective date of this subsection. For interim actions or cleanup actions conducted as independent remedial actions prior to the effective date of this subsection, the department recognizes little or no public notification typically occurred because there were no department-specified requirements other than the reporting requirements in this chapter. For these actions this chapter contains no other specific public notice requirements or guidance, and the court will need to determine such requirements, if any, on a case-by-case basis. For independent remedial actions consisting of site investigations and studies, it is anticipated that public notice would not normally be done since often these early phases of work are to determine if a release even requires an interim action or cleanup action. For the purposes of this subsection only, unless the court determines other notice procedures are adequate for the site-specific circumstances, the following ~~should~~ constitutes adequate public notice and supersedes the requirements in WAC 173-340-600:

(A) Except for emergency remedial actions, written notification has been mailed at least 15 days prior to beginning construction of the interim action or cleanup action to the last known address of the following persons: the department, which shall publish a summary of the notice in the site register; the local jurisdictional health department/district; the town, city or county with land use jurisdiction; ~~all~~ the land owners ~~currently~~ identified by the tax assessor at the time the action is commenced for that portion of the facility where the interim action or cleanup action is being conducted; and persons potentially liable under RCW 70.105D.040 known to the person conducting the interim action or cleanup action. In identifying other potentially liable persons who are to be noticed under this provision, the person doing the remedial action need only make a reasonable effort to review ~~readily available~~

information currently readily available. Where the interim action or cleanup action is complex, notification prior to beginning detailed design is recommended but not required. For emergency remedial actions, written notice should be provided as soon as practicable.;

(B) The notice includes: a brief statement describing the releases being remedied and the interim actions or cleanup actions expected to be conducted; the schedule for these interim actions or cleanup actions; and, for persons potentially liable under RCW 70.105D.040 known to the person conducting the interim actions or cleanup actions, a statement that they could be held liable for the costs of remedial actions being conducted; and,

(C) ~~In addition to written notification, p~~posting a sign at the site at a location visible to the general public indicating what interim actions or cleanup actions are being conducted and identifying a person to contact for more information. Except for emergency remedial actions this sign should be posted not later than the ~~prior to~~ beginning of construction of any interim action or cleanup action and should remain posted for the duration of the construction. For emergency remedial actions posting of a sign should be done as soon as practicable;

~~(D) These public notice procedures should be applied only to interim actions or cleanup actions conducted after the effective date of this subsection. For interim actions or cleanup actions conducted as independent remedial actions prior to the effective date of this subsection, this chapter contains no specific public notice requirements or guidance and the court will need to determine such requirements on a case-by-case basis; and~~

~~(E) For independent remedial actions consisting of site investigations and studies it is anticipated that public notice would not normally be done since often these early phases of work are to determine if a release even requires an interim action or cleanup action. However, once it has been determined that an interim action or cleanup action is needed and the engineering design process has begun, it is recommended the public notice procedures specified in WAC 173-340-550 (5)(c)(iii)(A) and (B) be implemented. For site investigation studies and engineering design work conducted as independent remedial actions prior to the effective date of this subsection, this chapter contains non specific public notice requirements or guidance and the court will need to determine such requirements on a case-by-case basis.~~

(iv) The remedial actions have been conducted substantially equivalent with the technical standards and evaluation criteria ~~procedures~~ contained in the following sections, where applicable. Where documents are required by the following sections the documents prepared need not be the same in title or format. Other documents can be used in place of the documents specified in these sections as long as sufficient information is included in the record to serve the same purpose. When using these sections to determine substantial equivalence it should be recognized that there are often many alternative methods for cleanup of a facility that would comply with these provisions. In applying these sections, reference should be made to the other applicable sections of this chapter, with particular attention to WAC 173-340-130 (Administrative principles), WAC 173-340-200 (Definitions) and WAC 173-340-210 (Usage):

(A) WAC 173-340-350 (State remedial investigation and feasibility study);

(B) WAC 173-340-360 (Selection of cleanup actions);

(C) WAC 173-340-400 (Cleanup actions);

(D) WAC 173-340-410 (Compliance monitoring requirements);

(E) WAC 173-340-430 (Interim actions);

(F) WAC 173-340-440 (Institutional controls)

(G) WAC 173-340-450 (Releases from underground storage tanks);

(H) WAC 173-340-700 through WAC 173-340-760 (Cleanup standards); and

(I) WAC 173-340-810 through WAC 173-340-850 (General provisions); and~~,~~

(v) For facilities where hazardous substances have been ~~treated or~~ disposed of as part of the remedial action, documentation is available indicating where these substances were ~~treated or~~ disposed of and that this ~~treatment or~~ disposal was in compliance with ~~all~~ applicable state and federal laws. It is not the intent of this provision to require extensive documentation. For example, if the remedial action results in solid wastes being transported off-site for disposal, it would be sufficient to have records indicating the wastes have been disposed of at a permitted solid waste or hazardous waste landfill.

(6) No Changes

NEW SUBSECTION

(7) Independent Remedial Actions

(a) The department has established a mechanism~~fee~~ to recover the direct and support costs associated with the review and evaluation of independent remedial action reports submitted under WAC 173-340-300(4). This ~~fee~~ enables the department to evaluate ~~a greater number of~~ independent cleanups and facilitates the return of property to productive use. Participation in t~~T~~his program~~fee~~ is voluntary, and Ecology will recover only the costs of review under the Independent Remedial Action Program from ~~is applicable only~~ those persons requesting the department's review of an independent remedial action report. Ecology shall recover its costs of providing the review of independent remedial action reports, including: ~~The fee includes the department's costs for:~~

(i) Providing a written determination regarding the adequacy of the remedial actions performed at a site; ~~or~~

(ii) Providing a written determination regarding the adequacy of the remedial actions performed at a site and removing sites or portions of sites from the hazardous sites list if the department has sufficient information to show that the independent remedial efforts are appropriate to characterize and address contamination at the site, as provided for in WAC 173-340-330(4)(b)~~.~~; or

(iii) Providing a written determination describing the deficiencies with the report or remedial action conducted at the site.

(b) The mechanism used to recover Ecology's costs~~fee schedule~~ shall be evaluated in June, 1994 and, if necessary, adjusted. ~~to reflect the average actual cost of the review~~. The mechanism used to recover Ecology's costs of review ~~fee schedule~~ shall be evaluated every other year thereafter. ~~The revised fee schedule shall be published in at least two publications of the Site Register.~~

(c) It is the department's policy, in conducting reviews under this subsection, to promote independent remedial actions by delisting sites or portions of sites whenever petitions and supporting documents show that the actions taken are appropriate to characterize and address the contamination at the site.

NEW SUBSECTION

(8) Prepayment of Costs. Persons may request the department's oversight of remedial actions through a prepayment agreement. The purpose of such an agreement is to enable department oversight of remedial actions at lower priority sites. The department shall make a determination that such an agreement is in the public interest. ~~Persons requesting a prepayment agreement shall agree not to dispute their status as a potentially liable person, if so named by the department, accept their status as a potentially liable person under WAC 173-340-500.~~ A prepayment agreement requires a ~~potentially liable~~ person to

pay the department's remedial action costs, in advance, allowing the department to increase staff for the unanticipated workload. Agreements may cover one or more facilities.

WAC 173-340-300 SITE DISCOVERY AND REPORTING

(4) Report of independent actions.

(a) Report. Any person who conducts an independent interim action or cleanup action shall submit a written report to the department within ninety days of the completion of the action. For the purposes of this section, the department will consider an interim action or cleanup action complete if no remedial action other than compliance monitoring has occurred at the site for ninety days. This is not intended to preclude earlier reporting of such action. See WAC 173-340-450 for additional requirements for reporting independent interim actions for releases from underground storage tanks. See WAC 173-340-550(c) for reporting, public notice, and other provisions for private rights of action.

EXPLANATION OF CHANGES IN THE PROPOSED LANGUAGE BASED ON PUBLIC COMMENT:

WAC 173-340-550(2)

Clarifying language was added regarding the Department's invoicing practices. Language was also added to describe the basis and method of computing direct staff charges. A statement regarding the Department's intent to not charge more than consultants was added. These are not changes, but clarifying statements.

WAC 173-340-550(2)(a), (b), and (c)

Introductory statements were eliminated. Exclusions from program support costs were described, and the Department's intent to have the rate calculations audited was included.

WAC 173-340-550 (5)

Statutory language which was duplicated in the draft rule amendment was deleted. Language was moved from WAC 173-340-550(5)(c)(iii) and clarified to reflect Ecology's anticipation that the requirements of this subsection will be evaluated by the courts as a whole and that a private right of action would not be disallowed due to omissions that do not diminish the overall effectiveness of the remedial action.

WAC 173-340-550 (5)(a)

Ecology deleted the requirement that payment of the Department's remedial action costs must be paid before a person can pursue a private right of action. Ecology will ensure recovery of its remedial action costs through existing authorities.

WAC 173-340-550 (5)(b)(ii)

Deletions and additions were made to this subsection for the purpose of general clarification.

WAC 173-340-550 (5)(b)(iii)

Some of the language has been moved around and clarified. Language has been added stating that for the purposes of this subsection, the actions listed are deemed adequate by Ecology and supersede the public participation requirements in WAC 173-340-600. The level of effort anticipated by Ecology in the notification of other potentially liable persons by the person conducting an independent remedial action was clarified. Language was also added making it a requirement that the sign posted at the site be placed at a location visible to the general public.

WAC 173-340-550 (5)(b)(iv)

The phrase "technical standards and procedures" has been replaced with the phrase "technical standards and evaluation criteria." Language has been added to recognized that documents prepared during an independent remedial action need not have the same title or format as those documents prepared under the applicable sections of the Model Toxics Control Act regulations. New language has also been added stating it should be recognized that there are often many alternative methods for cleanup of a facility.

WAC 173-340-550 (5)(b)(v)

The requirement to document where hazardous substances are treated and that the treatment was in compliance with applicable state and federal laws was deleted because of concerns stated in the responsiveness summary. Additional language was included to state the purpose of documenting where hazardous substances have been disposed of as part of an independent remedial action and that the disposal was in compliance with applicable state and federal laws.

WAC 173-340-550(7)(a)&(b)

Ecology decided to use the term "mechanism" instead of "fee" to allow more flexibility in determining how to collect the monies necessary to fund the program. Several commenters preferred that Ecology bill an hourly rate for the actual hours spent working on each site. After evaluating the fee schedule at the end of the first year of program implementation, Ecology may determine that a flat-fee system is not the most effective mechanism for Ecology to use to recover the costs of providing the service.

WAC 173-340-559(7)(a)(ii)

This additional language was included to make it clear that the review fee included the costs of removing a site from the Hazardous Sites List if Ecology issued it a no further action determination.

WAC 173-340-559(7)(a)(iii)

This subsection was added to make clear Ecology's commitment to providing a written determination of any deficiencies in a report or remedial action performed under this program.

WAC 173-340-559(7)(c)

This subsection was added to make it clear that Ecology's goal in promoting independent cleanups is to facilitate the removal of sites from the Hazardous Sites List.

WAC 173-340-550(8)

This subsection was changed to allow individuals who are not PLPs to enter into prepaid oversight agreements with the Department.

WAC 173-340-300(4)(a)

A new sentence was added to this subsection for the purpose of directing persons who conduct independent remedial actions to the reporting and public notice provisions of WAC 173-340-550(5). Persons conducting independent remedial actions should refer to section 550(5) if they anticipate pursuing a private right of action.

SCHEDULED ADOPTION DATE OF THE RULE

NOVEMBER 22, 1993

EFFECTIVE DATE OF THE RULE

DECEMBER 23, 1993